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FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, DC 20463

FIRST GENERAL COUNSEL'S REPORT

MUR: 6697

COMPLAINT FILED: Nov. 19, 2012

LAST RESPONSE RECEIVED: Jan. 30, 2013

ACTIVATED: Apr. 8, 2013

EARLIEST SOL: Sept. 15, 2017

LATEST SOL: Oct. 30, 2017

ELECTION CYCLE: 2012

COMPLAINANT:

Republican Party of Montana

RESPONDENTS:

League of Conservation Voters¹

Montana Conservation Voters

Montana Hunters and Anglers Leadership Fund and

Dan Bailey in his official capacity as treasurer²

Unknown Persons

**RELEVANT STATUTES
AND REGULATIONS:**

2 U.S.C. § 441d

11 C.F.R. § 100.22

11 C.F.R. § 110.11

INTERNAL REPORTS CHECKED:

Disclosure Reports

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

Complainant alleges that the League of Conservation Voters ("LCV"), Montana Conservation Voters ("MCV"), and the Montana Hunters and Anglers Leadership Fund ("Leadership Fund") paid for and authorized an anonymous mailer that was distributed across

¹ Patrick Collins and Theresa Keaveny were inadvertently notified as respondents in this matter "in [their] official capacit[ies] as treasurer[s]" for the League of Conservation Voters and Montana Conservation Voters, respectively. Because they are not the treasurers of these connected organizations, they have been administratively terminated as respondents from this matter.

² On December 13, 2013, the Montana Hunters and Anglers Leadership Fund filed an Amended Statement of Organization naming Dan Bailey as its treasurer in place of Joe Splinter. Statement of Organization (Dec. 13, 2013).

1 Montana in the weeks leading up to the 2012 general election and expressly advocated the
2 election of Libertarian candidate Dan Cox to the U.S. Senate. Complainant thus alleges that
3 Respondents have violated the Federal Election Campaign Act of 1971, as amended (the "Act")
4 by failing to include a disclaimer on the mailer.

5 The named Respondents all categorically deny any responsibility for the mailer. The
6 Leadership Fund, for its part, submitted an unsworn declaration from its treasurer and copies of
7 its mailers from the same time period in support of its denial.

8 Based on the Complaint and the Responses, it appears that an unknown person or persons
9 financed and authorized the mailer, which contains express advocacy. We therefore recommend
10 that the Commission find reason to believe that one or more Unknown Respondents violated
11 2 U.S.C. § 441d by failing to include a disclaimer on the anonymous mailer. Additionally,
12 because the expenditure for the mailer should have been disclosed in a report to the Commission
13 — and possibly also on a 24- or 48-hour notice of independent expenditure — we also
14 recommend that the Commission find reason to believe that one or more Unknown Respondents
15 violated 2 U.S.C. § 434(b)(4) and (b)(6) or (c)(1) and (g). We further recommend that the
16 Commission authorize a limited investigation to determine the identity of the Unknown
17 Respondents and take no action at this time with respect to LCV, MCV, and the Leadership
18 Fund.

19 II. FACTUAL BACKGROUND

20 The League of Conservation Voters is a national 501(c)(4) organization that "advocates
21 for sound environmental policies, elects pro-environment candidates who will adopt and
22 implement such policies, and provides state LCVs with the resources and tools to sustain and

1 accomplish their mission.” See <http://www.lcv.org/about/mission/>. LCV is registered with the
2 Commission as a connected organization.³

3 Montana Conservation Voters is a 501(c)(4) organization that describes itself as a
4 “statewide membership organization serving as the political voice of Montana’s conservation
5 and environmental community.” See <http://www.mtvoters.org/about>. MCV is registered with
6 the Commission as a connected organization.⁴

7 The Montana Hunters and Anglers Leadership Fund is an independent expenditure-only
8 political committee that registered with the Commission on February 16, 2011, and has filed
9 regular disclosure reports since that date. Its treasurer is Dan Bailey.

10 On July 10, 2012, these three organizations — LCV, MCV, and the Leadership Fund —
11 announced a partnership to support the re-election of Democrat Jon Tester to the U.S. Senate.
12 Compl. at 1 (Nov. 19, 2012); LCV Resp. at 2 (Jan. 28, 2013); MCV Resp. at 1 (Dec. 19, 2012).
13 In the weeks leading up to the 2012 general election, these organizations made independent
14 expenditures supporting Tester and opposing his Republican opponent, Congressman Dennis
15 Rehberg. Compl. at 1; LCV Resp. at 2; Leadership Fund Resp., Ex. A (Jan. 30, 2013). During
16 the same period, at least one of the Respondents sent mailings supporting the Libertarian
17 candidate for U.S. Senate, Dan Cox. Leadership Fund Resp., Ex. A. The partnership also ran a
18 television advertisement supporting Cox. Compl. at 1.

19 Also in the final weeks leading up to the election, an unidentified person or persons
20 mailed a postcard across Montana that opposed Rehberg and supported Cox. Compl. at 1, Ex. A.
21 An image of Rehberg appears on one side of the postcard, along with the statement:

³ LCV’s separate segregated fund is the League of Conservation Voters Action Fund.

⁴ MCV’s separate segregated fund is the Montana Conservation Voters Congressional Action Fund.

1-MONTANA-ENG-10

1 Dennis Rehberg: Wasting hundreds of millions of our tax dollars on pork barrel
2 projects. Congressman Dennis Rehberg has requested more earmarks than any
3 other House member. He requested at least \$100 million in earmarks in FY 2010
4 alone. It's no surprise that Congressman Rehberg helped a lobbyist, who was
5 later convicted of bribing public officials and was associated with Jack Abramoff,
6 secure millions of dollars in earmarks. Rehberg was voted "Biggest Pig" in
7 Congress by Citizens Against Government Waste.

8 Compl., Ex. A. After four citations to sources, the bottom of the postcard states: "To learn more,
9 visit: www.DanCox4Senate.com." *Id.* The other side of the postcard includes an image of Cox
10 accompanied by the text:

11 Dan Cox: A champion for fiscal responsibility. Dan Cox knows that Montana
12 needs less government spending — not more. He is a true conservative who
13 believes that Montanans, not the government, should be trusted to live their lives.
14 He opposed the stimulus, is against any big bank bailout, and will fight all forms
15 of unconstitutional spending. Dan Cox will protect our freedom and stop big
16 government overspending. [*Then, in larger font:*] Say no to wasteful spending.
17 Say yes to economic freedom.

18 *Id.* The postcard does not contain a disclaimer. Its only identifying information is a postmark
19 indicating the use of bulk mail permit number 781 from Las Vegas, Nevada. *Id.*

20 On the basis of their partnership and expenditures in support of Cox, the Complaint
21 alleges that LCV, MCV, and the Leadership Fund are responsible for the anonymous postcard.
22 Thus, the Complaint alleges that the Respondents violated the Act by failing to include a
23 disclaimer on the postcard.

24 LCV and MCV filed separate but substantively identical Responses. In sum, both parties
25 "categorically deny" any responsibility for the anonymous postcard. LCV Resp. at 1; MCV
26 Resp. at 2. LCV states that it did not "pay for, authorize, create, produce, or distribute the mail
27 piece referenced in the Complaint." LCV Resp. at 1. MCV states that it has not made any
28 expenditures supporting the candidacy of Cox, and that its Executive Director has no knowledge
29 of who produced, paid for, or disseminated the mailer. MCV Resp. at 2. Finally, both parties

1 assert that they had not even seen the mailer until the Complainant issued a press release
2 announcing the Complaint in this matter. LCV Resp. at 1; MCV Resp. at 2.

3 The Leadership Fund denies making any disbursements for the purpose of financing the
4 anonymous postcard, and submitted an unsworn declaration from its then-treasurer in support of
5 this denial. Leadership Fund Resp. at 1, Ex. B; Joseph Splinter Decl. ¶ 4 (Jan. 16, 2013). The
6 Leadership Fund also submitted copies of all of the independent expenditure mailings that it
7 financed between October 29 and November 1, 2012. Leadership Fund Resp. at 1, Ex. A. The
8 Leadership Fund asserts that all of these mailings contain a complete and proper disclaimer, and
9 that all were properly disclosed on timely independent expenditure reports.⁵ *Id.* at 1.

10 **III. LEGAL ANALYSIS**

11 **A. Failure to Include a Disclaimer**

12 Under the Act, all public communications⁶ that expressly advocate the election or defeat
13 of a clearly identified federal candidate must include a disclaimer. 2 U.S.C. § 441d(a); *see also*
14 11 C.F.R. § 110.11(a)(2).⁷ Communications authorized and paid for by a candidate, an
15 authorized committee of a candidate, or an agent of either, must clearly state that the
16 communications were paid for by the authorized political committee. 2 U.S.C. § 441(d)(a);
17 11 C.F.R. 110.11(b). Communications authorized by a candidate, an authorized committee of a

⁵ All of the attached mailers display the same bulk postage permit as the anonymous postcard: "U.S. Postage Paid, Las Vegas, NV, Permit No. 781." *See* Compl., Ex. A; Leadership Fund Resp., Ex. A.

⁶ The term public communication is defined to include mass mailings. 2 U.S.C. § 431(22); 11 C.F.R. § 100.26. A mass mailing, in turn, is defined as a mailing of more than 500 pieces of mail of an identical or substantially similar nature within any 30-day period. 2 U.S.C. § 431(23); 11 C.F.R. § 100.27. The postcard at issue here was allegedly mailed across Montana and it bears an apparent bulk postage permit. Thus, we assume that the postcard meets the definition of a mass mailing and is a public communication.

⁷ Public communications made by a political committee must include a disclaimer regardless of whether the communication expressly advocates the election or defeat of a clearly identified federal candidate. 2 U.S.C. § 441d; 11 C.F.R. § 110.11(a)(1). Although not an issue here as to the named Respondents, one or more of the unknown Respondents may be a political committee.

1 candidate, or an agent of either, but paid for by another person, must clearly state that the
2 communications were paid for by such person but authorized by the political committee. *Id.*
3 Finally, communications not authorized by a candidate, authorized committee, or an agent of
4 either must clearly state the name and permanent address, telephone number or World Wide Web
5 address of the person who paid for the communication, and state that it was not authorized by
6 any candidate or candidate's committee. *Id.*

7 As a public communication, the mailer would have required a disclaimer if it contained
8 express advocacy. Under Commission regulations, a communication expressly advocates the
9 election or defeat of a clearly identified federal candidate if it uses "phrases" such as "vote for
10 the President" or "Smith for Congress," among other enumerated examples, or "communications
11 of campaign slogan(s) or individual word(s), which in context can have no other reasonable
12 meaning than to urge the election or defeat of one or more clearly identified candidate(s), such as
13 posters, bumper stickers, advertisements, etc., which say, 'Nixon's the One,' 'Carter '76,'
14 'Reagan/Bush' or 'Mondale!'" 11 C.F.R. § 100.22(a); *see also Buckley v. Valeo*, 424 U.S. 1, 44
15 n.52 (1976) (concluding that "express words of advocacy" include terms such as "Smith for
16 Congress"). The Commission explained that the specific phrases enumerated in 11 C.F.R.
17 § 100.22(a), such as "Smith for Congress," have no other reasonable meaning than to urge the
18 election or defeat of a clearly identified candidate. *See Express Advocacy, Independent*
19 *Expenditures, Corporate and Labor Organization Expenditures*, 60 Fed. Reg. 35,292, 35,295
20 (July 6, 1995) (explanation and justification) ("E&J"); *see also Factual & Legal Analysis* at 4-5,
21 MUR 6170 (Tuscola County Democratic Committee) (concluding that an advertisement's use of
22 phrases specifically enumerated in 11 C.F.R. § 100.22(a) "fall[s] squarely within the definition
23 of express advocacy").

1 The mailer at issue invites recipients to visit the website www.DanCox4Senate.com.
2 Although it appears only as part of a domain name, the phrase "Dan Cox [for] Senate" contains
3 "express words of advocacy" all but identical to "Smith for Congress." 11 C.F.R. § 100.22(a);
4 *see also Buckley*, 424 U.S. at 44 n.52. By definition, then, the phrase itself has no other
5 reasonable meaning than to urge the election of Cox. E&J at 35,295. The mailer, therefore,
6 literally contains express advocacy under section 100.22(a).

7 We recognize that applying the Commission's so-called "magic words" bright-line
8 formulation to language of advocacy that occurs only in an internet domain name may well yield
9 formalistic or absurd results depending on the circumstances presented in a particular matter. In
10 such cases, the Commission is vested with discretion to dismiss the matter in the regular ordering
11 of its priorities under *Heckler v. Chaney*.⁸

12 Nonetheless, on the facts presented here, we believe an express advocacy finding would
13 not warrant dismissal. The additional content of the mailer and the manner in which the domain
14 name appears together enhance the exhortative call in the domain name to vote for Cox. For
15 instance, the mailer compares Rehberg's record of wasteful spending (calling Rehberg "the
16 '[b]iggest [p]ig' in Congress") with Cox as a "champion for fiscal responsibility." In this matter,
17 the context of the advertisements in which the "magic words" appear serves to amplify the
18 message presented in the domain name, similar to the circumstances found in MUR 4313
19 (Coalition for Good Government, Inc.). In that matter, a television advertisement included the
20 photos of four presidential candidates along with background images of bumper stickers
21 expressly advocating their election. Factual & Legal Analysis at 9-10, MUR 4313. Although
22 each of the four bumper stickers contained so-called "magic words" phrases under section

⁸ 470 U.S. 821 (1985).

1 100.22(a),⁹ the Commission concluded that the advertisement expressly advocated the election of
2 only one of those candidates, Richard Lugar. The Commission found that the advertisement
3 gave prominence to Lugar because the "Richard Lugar for President" phrase on his bumper
4 sticker was combined with positive statements on an issue associated with him and the lack of
5 comparable statements about the positions of the other three presidential candidates featured in
6 the advertisement. *See id.* at 21-22. Similarly, here too, the mailer includes literal words of
7 express advocacy together with positive statements about Cox, and accords Cox greater
8 prominence by criticizing his opponent, all while providing Cox's campaign website — along
9 with its electoral exhortation — but not Rehberg's.

10 The mailer also expressly advocates the election of Cox and the defeat of Rehberg under
11 section 100.22(b). Under section 100.22(b), a communication constitutes express advocacy
12 "[w]hen, taken as a whole and with limited reference to external events, such as the proximity to
13 the election, [it] could only be interpreted by a reasonable person as containing advocacy of the
14 election or defeat of one or more clearly identified candidate(s), because — (1) [t]he electoral
15 portion of the communication is unmistakable, unambiguous, and suggestive of only one
16 meaning; and (2) [r]easonable minds could not differ as to whether it encourages actions to elect
17 or defeat one or more clearly identified candidate(s) or encourages some other kind of action."
18 11 C.F.R. § 100.22(b). The Commission has explained that "[c]ommunications discussing or
19 commenting on a candidate's character, qualifications, or accomplishments are considered
20 express advocacy . . . if, in context, they have no other reasonable meaning than to encourage
21 actions to elect or defeat the candidate in questions." E&J at 35,295; *cf. FEC v. Wisconsin Right*

⁹ See Conciliation Agreement ¶ IV.2, MUR 4313. This Office observed in that matter that, although the other bumper stickers in the advertisement contained words of express advocacy in favor of the candidates, the message of the advertisement as to those candidates was negative. *See* First Gen. Counsel's Rpt. at 31 n.6, MUR 4313.

1 *to Life, Inc.* 551 U.S. 449, 469-470 (2007) (indicia of express advocacy include “tak[ing] a
2 position on a candidate’s character, qualifications, or fitness for office”).

3 Here, the mailer contains an “electoral portion” because the domain name
4 www.DanCox4Senate.com squarely places the mailer within the context of an election. The
5 mailer also unmistakably and unambiguously encourages recipients to vote for Cox and against
6 Rehberg. It criticizes Rehberg as “[w]asting hundreds of millions of our tax dollars on pork
7 barrel projects” and lauds Cox as a person who will “protect our freedom and stop big
8 government overspending.” After these statements about the character and accomplishments of
9 Rehberg and Cox, the mailer, in larger font, instructs recipients to “[s]ay no to wasteful
10 spending” and “[s]ay yes to economic freedom.” Compl, Ex. A. This instruction to say no to
11 waste and yes to economic freedom — after characterizing Rehberg as wasteful and Cox as
12 representing freedom — is an instruction to say no to Rehberg and yes to Cox. When taken as a
13 whole and with limited reference to external events such as the web address and the proximity to
14 the election, the mailer can only be reasonably interpreted as a message to defeat Rehberg and
15 elect Cox.

16 Accordingly, because the anonymous mailer contains express advocacy, it required a
17 disclaimer regardless of who paid for and authorized it.¹⁰ The named Respondents, however, all
18 categorically deny any responsibility for the anonymous postcard. The Leadership Fund, for its
19 part, submitted a declaration from its treasurer in support of its denial and copies of mailers that
20 it financed between October 29 and November 1, 2012 — all of which include disclaimers. *See*
21 *Leadership Fund Resp., Exs. A, B.* Notably, one of these attached mailers expressly advocates

¹⁰ A disclaimer would have been required even if the mailer did not contain express advocacy if one or more of the unknown Respondents is a political committee.

1 the election of Cox — disaffirming any inference that the Leadership Fund would purposefully
2 exclude a disclaimer from another mailer supporting Cox.

3 It thus appears that an unknown person or persons may have financed the mailer.
4 Accordingly, we recommend that the Commission find reason to believe that one or more
5 Unknown Respondents violated 2 U.S.C. § 441d by failing to include a disclaimer on the mailer
6 at issue in this matter. We also recommend that the Commission authorize a limited
7 investigation to determine the identity of these unknown persons, and authorize compulsory
8 process. Finally, we recommend that the Commission take no action at this time with respect to
9 LCV, MCV, and the Leadership Fund.

10 **B. Failure to Report Expenditure**

11 Under the Act, authorized candidate committees must file reports disclosing, *inter alia*,
12 their expenditures; similarly, unauthorized political committees must file reports disclosing, *inter*
13 *alia*, their independent expenditures. *See* 2 U.S.C. § 434(b)(4)(G) (requiring authorized
14 committees to disclose all disbursements); *id.* § 434(b)(4)(H)(iii) (requiring unauthorized
15 political committees to report independent expenditures); *see also id.* § 434(b)(6)(A), (B)(iii)
16 (requiring political committees to identify persons receiving disbursements aggregating in excess
17 of \$200 within the calendar year). In addition, every person other than a political committee that
18 makes independent expenditures in an aggregate amount that exceeds \$250 during a calendar
19 year must file an independent expenditure report. *Id.* § 434(c)(1). Depending on the amount and
20 timing of the expenditures, a person (including a political committee) may also have to file a 24-
21 or 48-hour notice of independent expenditures. *See id.* § 434(g)(1)(A) (requiring 24-hour notices
22 for independent expenditures aggregating \$1,000 or more after the 20th day, but more than 24
23 hours, before the date of an election); *id.* § 434(g)(2)(A) (requiring 48-hour notices for

1 independent expenditures aggregating \$10,000 or more at any time up to and including the 20th
2 day before the date of an election).

3 Regardless of who financed the mailer at issue in this matter, the available information
4 suggests that the expenditure should have been disclosed in a report to the Commission. If either
5 an authorized candidate committee or an unauthorized political committee made the expenditure,
6 it should have been disclosed in the committee's regular disclosure report to the Commission.
7 *See id.* § 434(a)(2), (4). If a person other than a committee made the expenditure and the cost of
8 the mailer in conjunction with any other independent expenditures made during the calendar year
9 exceeded \$250, which seems likely here, the person should have filed an independent
10 expenditure report with the Commission. *See id.* § 434(c)(1). Accordingly, we recommend that
11 the Commission find reason to believe that one or more Unknown Respondents violated 2 U.S.C.
12 § 434(b)(4) and (b)(6) or (c)(1) by failing to report the expenditure made for the mailer at issue
13 in this matter. Further, depending on the party responsible for the mailer, and the timing and
14 amount of its expenditures, the unknown party may have been required to file a 24- or 48-hour
15 notice of the independent expenditure. Because the mailer was distributed in the weeks leading
16 up to the election, we also recommend that the Commission find reason to believe that one or
17 more Unknown Respondents violated 2 U.S.C. § 434(g).

18 **IV. PROPOSED INVESTIGATION**

19 We propose to conduct a limited investigation to identify the unknown person or persons
20 who paid for and authorized the anonymous mailer, identify its costs, and determine the scope of
21 its distribution. The bulk permit number provides a clear and straightforward lead from which to
22 trace it. We also request that the Commission authorize the use of compulsory process,

including the issuance of appropriate interrogatories, document subpoenas, and deposition subpoenas, as necessary.

V. RECOMMENDATIONS

1. Find reason to believe that one or more Unknown Respondents violated 2 U.S.C. § 441d.
2. Find reason to believe that one or more Unknown Respondents violated 2 U.S.C. § 434(b)(4) and (b)(6) or (c)(1).
3. Find reason to believe that one or more Unknown Respondents violated 2 U.S.C. § 434(g).
4. Take no action at this time with respect to the League of Conservation Voters, Montana Conservation Voters, and Montana Hunters and Anglers Leadership Fund and Dan Bailey in his official capacity as treasurer.
5. Authorize the use of compulsory process, including the issuance of appropriate interrogatories, document subpoenas, and deposition subpoenas, as necessary.
6. Approve the attached Factual & Legal Analysis.¹¹

¹¹ The Factual and Legal Analysis will be sent to the party responsible for the mailers once its identity is ascertained in the investigation.

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BY: Walter Guth *ms*

Date _____


Margaret R. Howell
Attorney